Supreme Court, U.S.
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No. 98-1498

IN THE

Supreme Court of the United States

NAUMAN S. SCOTT, U.S. DISTRICT JUDGE,

Petitioner,

v.

MICHAEL P. TONE, ANNE FIEDLER, ROBERT B. BIECK, JR., JAMES W. BERRY, WILLIAM E. WRIGHT, JUDY L. BURNTHORN, W. GLENN BURNS and AMERICAN CASUALTY CO. OF READING, PENNSYLVANIA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT JUDY L. BURNTHORN

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STATEMENT OF THE CASE

Judge Scott's petition is one of five petitions seeking this Court's review of the Fifth Circuit's judgment reversing in part and affirming in part the judgment of the district court imposing, in the exercise of its inherent sanctions power, various sanctions on an insurance company and seven attorneys.[1] In particular, the district court sanctioned respondent Judy L. Burnthorn ("Burnthorn") with a reprimand. The Fifth Circuit concluded, in part, that the district court's finding of bad faith conduct, necessary for the imposition of such a sanction against Burnthorn, was clearly in error. Accordingly, the Fifth Circuit reversed and vacated the district court's imposition of the sanction against Burnthorn. Further, the Fifth Circuit concluded the evidence was completely insufficient to support the sanction imposed against Burnthorn, and altogether dismissed the sanctions proceeding against her. The Fifth Circuit also reviewed and ruled on the sanctions imposed on the other sanctions defendants.[2]

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1. The other petitions include: (a) petition on behalf of sanctions defendant William E. Wright, Jr., No. 98-1465; (b) petition on behalf of sanctions defendant James W. Berry, No. 98-1468; (c) petition on behalf of sanctions defendant Robert B. Bieck, Jr., No. 98-1469; and (d) petition on behalf of sanctions defendant W. Glenn Burns, No. 98-1470.

2. The Fifth Circuit reversed and vacated the sanctions imposed on each of sanctions defendants American Casualty Company of Reading, Pennsylvania, Michael P. Tone, and Anne Fiedler, and then altogether dismissed the sanctions proceeding as to them. The Fifth Circuit also reversed and vacated the sanctions imposed on each of sanctions defendants William E. Wright, Jr., Robert B. Bieck, Jr., and W. Glenn Burns, and then remanded, as to them only, to the district court, with instructions. Finally, the Fifth Circuit affirmed the sanctions imposed on sanctions defendant James W. Berry.

United States District Judge Nauman S. Scott, the very district court judge who imposed sanctions on, among others, respondent Burnthorn, has taken the unusual step of filing a petition with this Court, purportedly on his own behalf, seeking outright reversal of the Fifth Circuit's judgment and reinstatement of his judgment. Alternatively, Judge Scott asks this Court to remand the matter to him "for further proceedings consistent with its guidelines." Petition at 29.

REASONS FOR DENYING THE WRIT

I.

JUDGE SCOTT LACKS AUTHORITY TO SEEK, ON HIS OWN BEHALF, A PETITION TO REVIEW THE JUDGMENT OF THE FIFTH CIRCUIT COURT OF APPEALS

At the district court level, Judge Scott presided over the sanctions proceeding against various sanctions defendants, including Burnthorn. Each of the sanctions defendants, including Burnthorn, sought review of Judge Scott's judgment in the Fifth Circuit. Because Judge Scott was not a party, but nevertheless wished to present argument in opposition to the appeals filed from his judgment, he filed a motion for leave to file a brief with the Fifth Circuit. In his April 18, 1997 motion, Judge Scott requested "leave to file a brief to reply to the briefs filed by the sanction defendants." By order dated June 11, 1997, the Fifth Circuit granted Judge Scott's motion and granted him leave to file a brief in response to the appellants' brief, without prejudice to later reconsideration. Judge Scott did not file a motion to intervene in the Fifth Circuit or in this Court.

In his petition, Judge Scott purports to invoke this Court's jurisdiction under 28 U.S.C. § 1254(1), which provides that

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> > (1) By writ of certiorari granted upon the petition of any *party* to any civil or criminal case, before or after rendition of judgment or decree; . . .

28 U.S.C. § 1254(1) (emphasis added).

This statutory provision makes clear that only a *party* to a civil or criminal case may seek a petition for writ of certiorari. Judge Scott was not a party in the district court, and he was also not a party in the Fifth Circuit.

In *Karcher v. May*, 484 U.S. 72, 108 S. Ct. 388 (1987), this Court reaffirmed that

> [o]ne who is not an original party to a lawsuit may of course become a party by intervention, substitution, or third-party practice. But we have consistently applied the general rule that one who is not a party or has not been treated as a party to a judgment has no right to appeal therefrom.

Karcher, 484 U.S. at 77, 108 S. Ct. at 392 (numerous citations omitted).

Judge Scott was not a party to the sanctions proceedings that give rise to the appeal sought to be reviewed herein — Judge Scott was the judge in those sanctions proceedings.

Further and in any event, the sanctions proceedings at issue herein were brought in the district court ostensibly to vindicate the judicial power of the United States. In a case such as this one, in which the United States is interested, it is the exclusive province of the Solicitor General to appear in this Court to represent the United States:

> Except when the Attorney General in a particular case directs otherwise, the Attorney General and the Solicitor General shall conduct and argue suits and appeals in the Supreme Court . . . in which the United States is interested.

28 U.S.C. § 518(a).[3]

In *United States v. Providence Journal Company*, 485 U.S. 693, 108 S. Ct. 1502 (1988), this Court held that, unless he is represented by the Solicitor General or his designee, a district court judge is without authority to file, on his own behalf, a petition with this Court seeking review of a judgment of the Court of Appeals that reversed that district court judge's imposition of sanctions. Further, in *Federal Election Commission v. NRA Political Victory Fund*, 513 U.S. 88, 115 S. Ct. 537 (1994), this Court held that the Solicitor General may not seek to ratify an unauthorized

3. The Attorney General has delegated authority to the Solicitor General to conduct, or assign and supervise, "all Supreme Court cases, including appeals, petitions for and in opposition to certiorari, briefs and arguments, and . . . settlement thereof." 28 C.F.R. § 0.20 (1987).

filing of a petition in this Court in a case in which the United States is interested, unless the Solicitor General authorized that filing within the 90-day time period for filing a petition. *Id.*, 513 U.S. at 98, 115 S. Ct. at 543. In this case, Judge Scott is not represented by the Solicitor General or his designee, but is instead represented by privately appointed counsel (who is also counsel for the plaintiffs in the underlying civil action). Further, by correspondence dated April 14, 1999, the Solicitor General advised Judge Scott's counsel that Judge Scott "neither sought or received" timely authorization from the Solicitor General to file a petition in this Court.[4]

Applying the law as expressed by this Court and by Congress to the facts of this case, it is clear that Judge Scott is without authority to file this petition on his own behalf and represented by appointed private counsel not authorized by the Solicitor General. Accordingly, Judge Scott's petition must be denied.

II.

ALTERNATIVELY, JUDGE SCOTT IS NOT ENTITLED TO ANY RELIEF FROM THE FIFTH CIRCUIT'S JUDGMENT DISMISSING THE SANCTIONS PROCEEDING AGAINST BURNTHORN

Alternatively, if Judge Scott's petition is to be considered at all, then this Court's review of the Fifth Circuit's opinion should be limited to the narrower and sole issue addressed by Judge Scott's petition: whether the Fifth Circuit erred when it reversed and vacated the district court's

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4. The Solicitor General sent a copy of his correspondence to the Clerk of this Court.

imposition of monetary fines against each of sanctions defendants American Casualty Company of Reading, Pennsylvania ("CNA") and Michael P. Tone ("Tone"), and then altogether dismissed the sanctions proceeding as to them. The Supreme Court Rules provide, in relevant part, that "[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court." Rule 14.1(a), Supreme Court Rules. The Questions Presented by Judge Scott's petition address only the narrow issue of the sanctions imposed on CNA and Tone. The issue of whether the Fifth Circuit erred when it reversed and vacated the sanction imposed upon Burnthorn, and dismissed the sanction proceedings as to her, is not fairly included in the questions set out in Judge Scott's petition. As this Court explained in *Yee v. City of Escondido, California*, 503 U.S. 519, 112 S. Ct. 1522 (1992), Rule 14.1(a):

> . . . provides the respondent with notice of the grounds upon which the petitioner is seeking certiorari, and enables the respondent to sharpen the arguments as to why certiorari should not be granted. Were we routinely to consider questions beyond those raised in the petition, the respondent would lack any opportunity in advance of litigation on the merits to argue that such questions are not worthy of review. Where, as is not unusual, the decision below involves issues on which the petition does *not* seek certiorari, the respondent would face the formidable task of opposing certiorari on every issue the Court might conceivably find present in the case. By forcing the petitioner to choose his questions at the outset, Rule 14.1(a) relieves the respondent of the expense of unnecessary

> litigation on the merits and the burden of opposing certiorari on unpresented questions.

Yee, 503 U.S. at 535-36, 112 S. Ct. at 1533 (emphasis in original).

Because the propriety of the dismissal of the sanction imposed on respondent Burnthorn is not listed by Judge Scott as a question presented for review, Judge Scott is clearly not entitled to any relief from that portion of the judgment of the Fifth Circuit.

Further and in any event, there is no cause for this Court to review or disturb that portion of the Fifth Circuit's judgment that vacated and dismissed the sanction imposed on respondent Burnthorn. The district court imposed the sanction on Burnthorn for alleged discovery abuse only, since Burnthorn had not been at all involved in the negotiations of the settlement. In reviewing and ultimately reversing the district court's imposition of sanctions against Burnthorn, among others, the Fifth.Circuit concluded that:

> [w]ith respect to CNA, Tone, Fiedler, and Burnthorn, there was no finding or evidence of any incorrect answer to any discovery request at all, much less a willfully false response. Furthermore, there was no finding or evidence that any of these defendants willfully aided anyone else in making or concealing an incorrect response, or even that they knew that anyone had made an incorrect response. Finally, there was no finding or evidence that Tone, Fiedler, or Burnthorn ever engaged in any affirmative misrepresentations with respect to the D&O

> Policy. As to CNA, Tone, Fiedler, and Burnthorn, the district court's finding of bad faith conduct was therefore clearly in error and its imposition of sanctions an abuse of discretion.

August 12, 1998 Fifth Circuit Opinion, Appendix to Judge Scott's Petition at 46-47.

Based on these findings, the Fifth Circuit not only reversed and vacated the district court's imposition of sanctions against Burnthorn, but also dismissed the sanctions proceeding as to her. In this Court, Judge Scott devotes only one brief footnote of his entire petition to address the Fifth Circuit's reversal and dismissal of the sanction imposed on Burnthorn. Petition at 7, n.4. Significantly, Judge Scott has not identified any legal or factual basis for the reversal of that portion of the Fifth Circuit's judgment. Accordingly, the broad relief of an outright reversal of the Fifth Circuit's judgment sought by Judge Scott, relief not supported by any legal argument in Judge Scott's petition, should be denied. Similarly, no basis is offered, and none exists, for the alternative relief sought by Judge Scott of a remand of this matter, to the extent such remand were to involve respondent Burnthorn.

CONCLUSION

In conclusion, Judge Scott was not a party to the proceedings in the Fifth Circuit, and in any event he is without authority to file a petition on his own behalf in this Court. Accordingly, his petition should not be considered. Alternatively, if his petition is to be considered at all, then the issue of whether the Fifth Circuit erred when it reversed and vacated the sanction imposed upon respondent Judy L. Burnthorn, and dismissed the sanction proceedings as to her, has not been raised by Judge Scott in his petition. It is respectfully urged that this Court should not consider this issue, and should deny the relief sought by Judge Scott in his petition, to the extent his petition purports to seek a reversal of that portion of the Fifth Circuit's judgment or seeks a remand of further sanctions proceedings as to respondent Judy L. Burnthorn.

Respectfully submitted,

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